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FREE THE CHILDREN: PARENT'S ABANDONMENT OF GREEN CARD SHOULD NOT BE IMPUTED ON CHILD

Posted on December 2, 2013 by Cyrus Mehta

There are a number of unfortunate cases where the parent abandons lawful permanent resident (LPR) status by staying outside the United States resulting in the child's LPR status also being abandoned. Should the child's LPR status be deemed abandoned even if the child had no intention to abandon that status?

The answer, unfortunately, is "Yes," but there might still be grounds for putting up a fight. There is a precedent decision of the Board of Immigration Appeals, *Matter of Zamora*, 17 I&N Dec. 395 (BIA 198), which holds that if the parent abandons his or her LPR status while the child is in the custody and control of the parent, then the parental abandonment may be imputed to the child. The reasoning in *Matter of Zamora* is based on the premise that a minor child cannot legally possess an intent to remain in the United States distinct from his or her parent's intent. Even the State Department's Foreign Affairs Manual acknowledges that a child under the age of 16 years is not considered to possess a will or intent separate from that of the parent with regard to a protracted stay abroad. 9 FAM 42.22 N5.

Essentially, an LPR must be returning from a temporary visit abroad under INA § 101(a)(27) in order to avoid a charge of abandonment. The term "temporary visit abroad" has been subject to much interpretation by the Circuit Courts. The Ninth Circuit's interpretation in *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997) is generally followed:

A trip is a 'temporary visit abroad' if (a) it is for a relatively short period, fixed by some early event; or (b) the trip will terminate upon the occurrence of an event that has a reasonable possibility of occurring within a relatively short period of time."If as in (b) "the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively

short period of time, the visit will be considered a "temporary visit abroad" only if the alien has a continuous, uninterrupted intention to return to the United States during the visit.

Therefore, when an LPR is unable to establish that the trip abroad was temporary under the formula established in *Singh v. Reno*, and thus deemed to have abandoned that status, it would be imputed to the child. I question whether it is good policy as there may be a number of situations where a child may possess a separate intention from that of the parent. The Ninth Circuit Court of Appeals in *Khoshfahm v. Holder,* 656 F.3d 1147 (9th Cir. 2011), while affirming *Zamora*, raised this possibility by citing the example of LPR parents who leave the country, but leave their child in the US to attend school or live with a relative. Under the principle set forth in *Zamora*, the parents' length of stay abroad, along with a lack of continuous intent to return to the US, could result in a finding that they had abandoned status, but it would be unreasonable to impute the parents' abandonment to the child who never left the US. There are other situations too, where say an abusive parent who is an LPR takes the child abroad and does not allow the child to return back to the US. This would result in an unfair outcome, and is inconsistent with prevailing immigration policy. The Violence Against Women Act ensures that battered spouses, children and other relatives do not need to depend on the abuser's status to apply for immigration benefits by enacting INA sections 204(a)(1)(A) and (1)(B), which allow battered spouses of US citizens and permanent residents to self-petition for permanent residency even when the abusive spouse either refuses to sponsor or has withdrawn support on a previously filed I-130 petition. The intent of an abusive parent can also be considered as analogous to the fraudulent conduct of a parent, which is not imputed to the innocent child. *See Singh v. Gonzales*, 451 F.3d 400, 409-410 (6th Cir. 2006).

The argument to not attribute any abandonment by the parent on the child is further bolstered when the parent legally ceases to be a custodial parent, possibly due to the abusive relationship, and this is supported by the State Department guidance at 9 FAM 42.22 N5(c), which provides:

In the case of LPR children who you believe spend more than one year outside the United States as a result of an abduction by a non-custodian parent, please contact Overseas Citizen's Services, Office of Children's Issues (CA/OCS/CI) and the Post Liaison Division (CA/VO/F/P) to determine the proper course of action. While a returning resident visa is the preferred way for the child to return to

the United States and be admitted in the proper status, a non-custodial parent may not be willing to cooperate in order to complete the returning resident visa process. CA/OCS/CI, CA/VO/F/P, and CA/VO/L/A can advise you on options in coordination with DHS to allow the child to travel back to the United States.

The Ninth Circuit in *Khoshfahm* also held that a child can have his or her own intent upon reaching 18th, which is like the State Department's policy, although the State Department cuts off the age at 16. Thus, a child should be able to establish his or her own intent independent o the parent's intent after 16 or at least by 18.

It was thus heartening to find an unpublished decision by Immigration Judge Philip J. Montante, Jr. on AILA InfoNet at Doc. No. 13112247 (posted 11/22/13), which held that the abandonment of LPR status by a divorced parent could not be imputed to the child who was under the age of 18 where the divorce decree specifically required the child to travel to the US to visit her father resided in order to maintain her US residency. The child was also able to demonstrate that she visited her father in the US several times. Hats off to attorney Eric Schulz in Buffalo, NY, who was the attorney for the child respondent!

When an LPR child finds himself or herself in such a situation and has been outside the US for more than a year without a valid reentry permit, the child may be eligible to apply for an SB-1 visa as a returning legal permanent resident at a US consular post. Alternatively, the child can also arrive at a port of entry in the US and be prepared to submit a Form I-193 waiver under INA section 211(b) as a returning legal permanent resident who has a valid Form I-551 (green card) but has been outside the United States for more than one year. This is risky, however, because If the child is not waived into the US, then the child will be issued a Notice to Appear, alleging that he or she is an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the INA. The NTA will most likely charge the child as being subject to removal pursuant to INA section 212(a)(7)(A)(i)(I). Although the child will be subject to a removal hearing before an Immigration Judge, where an alien has a colorable claim to returning resident status, the government bears the burden of proving

abandonment of lawful status “by clear, unequivocal and convincing evidence.” *See e.g. Matadin v. Mukasey*, 546 F.3d 85 (2d Cir. 2008).

Attorneys representing LPR children who have been deemed to have abandoned their LPR status through imputation should, where the facts warrant, be prepared to chip away at the principle set forth in *Zamora*. It is no longer fair to reflexively impute the abandonment of a parent’s LPR status onto a child, especially in situations where the child has expressed an intent contrary to the parent.

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